



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

CHURCH CEMETERIES IN THE AMERICAN LAW.

ONE OF the most usual sights in any rural community in the United States is a church edifice with a cemetery in the immediate neighborhood. This condition of affairs, where a church society antedates the municipal corporation within whose limits it exists, can even occasionally be found in populous cities. Such cases, however, are fast disappearing. The demands of commerce and the doctrines of modern sanitation are too strong to be resisted. When a cemetery situated in the heart of a city is not abandoned on account of the monetary inducements held out by commercial interests, the law-making power of the city council and even of the state legislature is invoked. By forbidding the interment of any more bodies in such cemeteries the danger to sanitation is minimized and the property is put in a position where it will eventually become available for commercial purposes.

But the slow process by which this result is accomplished will not always serve the exigencies of a growing city. A cemetery may be directly in the way of a proposed public improvement. It may be necessary to widen a street and for this purpose condemn a strip of land used as a burying ground. In such cases the imperative needs of the living must take precedence over the deference due to the dead. Land consecrated for a cemetery will be taken by eminent domain under such circumstances, just like other property. The remains of the dead will have to be disinterred and monuments erected in their memory taken down permanently or re-erected in the place to which such remains are removed.

It is obvious that these changes must give rise to very delicate questions of law. Some of the dead will be found buried in rows in the order in which they have died. Others will be found buried in lots for which a consideration has been paid. Still others will have costly monuments, amounting in some cases to masoleums, erected over their remains. The rights of the church society or religious corporation and of the next of kin and of the public at large in the remains of these dead, and in the monuments which mark their graves, and in the graves themselves, must be determined under these circumstances. This accordingly has been done in a series of carefully considered cases, whose result will be set forth in the following pages.

The legal right of the relatives of a deceased person in his body has passed through a series of mutations in the laws of the various nations whose legal systems have come down to us. In ancient

Egypt a son could mortgage his father's corpse. In portions of Europe during the middle ages a creditor could seize the dead body of his debtor. Conceptions such as these, as well as the opinion of the ancient school of cynics that it is utterly immaterial whether dead bodies are burned, buried, or devoured by wild beasts, do not fit into the jurisprudence of a Christian country. The Christian religion, believing as it does, in the resurrection of the dead, cannot but regard and treat with reverence the remains to be resurrected. This feeling has been impressed upon the laws of all Christian nations and has borne fruit in statutes and ordinances protecting corpses from desecration.

This part of the law, however, has passed through a peculiar development in England. The English ecclesiastical courts have divided jurisdiction over this matter with the common law courts, by assuming complete control over the bodies of deceased members of the Established Church. They have, however, left to the common law courts the protection of the monuments erected over their graves. Says Lord COKE: "In every sepulchre that hath a monument, two things are to be considered: viz., the monument and the sepulture or burial of the dead. The burial of the cadaver that is *caro dato vermibus* (flesh given to worms), is *nullius in bonis* and belongs to ecclesiastical cognizance; but as to the monument, action is given, as hath been said, at the common law for the defacing thereof."¹

Under this system the church has the exclusive control over the dead bodies of its members. While it permits the heirs and next of kin to erect monuments and otherwise embellish the grave, it does not—in theory at least—allow them to control the corpse, or choose the funeral ceremonies or the place of burial.² Neither will the temporal courts enforce any such demand for such control as may be made by the heirs or next of kin of the deceased. In case of the desecration of a corpse they will be completely helpless and the ecclesiastical courts will be the only tribunal at which to find relief.

This system works well enough in England, where the ecclesiastical courts are recognized as part of the judicial system of the country, but breaks down completely in America where ecclesiastical tribunals have no civil jurisdiction. While the various states in the Union grant to all religious organizations the largest and broadest latitude and liberty to adopt all or any proper rules or regulations to the end that their votaries may worship God according to the dictates of their own conscience, they jealously watch and resist any

¹ Third Institute, p. 203.

and all attempts on the part of any church to usurp powers or authority outside of or beyond its legitimate functions. The control of the dead bodies of its members is not necessary for the complete enjoyment of religious freedom on the part of any religious society and hence is outside of its scope. It follows that it has no such control.³

It is necessary, however, that some one should have legal control over these bodies so as to be in a position to protect them from desecration. It is plain that no more natural guardian of such bodies can be found than the next of kin of the deceased. To them such custody is therefore exclusively committed. While a corpse is not property in the sense that is subject to barter and sale,⁴ it is property for the limited purpose of enforcing "the sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose," which right rests "on the deepest and most unerring instincts of human nature."⁵ The remedies existing in England through the ecclesiastical courts being unavailable in this country, the common law powers of the ordinary courts—narrowed in England by the "fungous excrescence" of the ecclesiastical courts—have therefore been widened so as to include the protection, not only of the monuments erected in memory of the dead, but also of what remains of their bodies.

It has therefore been held, in a case in which a corpse had been buried for fifty years in a cemetery which was condemned to allow a street to be widened, that such body was "private property" within the clause of the New York Constitution which forbids such property to be taken without just compensation. The court said that the "posthumous man" was legally standing in court distinctly individualized with his daughters, his next of kin, by his side entitled to require that the tribunal which ejected him from his grave should also set aside the necessary funds for his decent re-interment.⁶

It must not, however, be supposed that this control by the next of kin is a captious one, subject only to their own fleeting fancy. The children of a mother interred for eleven years according to her own wishes by her husband (a non-Catholic), in a Catholic cemetery, will therefore, not be allowed to disinter her remains after her husband's death for the purpose of placing them by his side. The wishes of both the father and mother expressed during their life-

² Lewis, J., in *re* Donn, 14 N. Y. Supp., 189, 190.

³ In *re* Donn, *supra*.

⁴ In *re* Donn, *supra*.

⁵ In the matter of Beekman Street, 4 Brad. Surr. (N. Y.) 503, 529.

⁶ In the matter of Beekman Street, 4 Brad. Surr. (N. Y.) 503, 528.

time, will be sufficiently regarded by the courts to prevent the necessarily unseemly disinterment of the body of the mother.⁷

While thus the ordinary courts in America have a jurisdiction over dead bodies which is not possessed by the ordinary English courts, their jurisdiction in regard to the grave itself and its adornments is coextensive with the jurisdiction possessed by the English courts. These courts from time immemorial have considered the tombstone, the armorial escutcheons, the coat and penons and ensigns of honor—whether attached to the church edifice or to the tomb, or unattached—as “heir-looms,” and have classified them as real estate descending at the death of the owner to his heirs. The American courts, while having little or no occasion to classify this particular kind of property, have with great care protected it and the bodies in connection with which it has been created. Therefore the Pennsylvania Supreme Court, in holding that a mechanics’ lien taken out against a church building does not cover the adjoining cemetery, said: “It is not possible to believe that the congregation, in making the new erection, intended to hazard a change of ownership or uses, so far as respects the burying ground. Nor is it probable that the honest mechanics engaged in erecting the new building imagined they were acquiring a lien on the grave-yard, with its tombstones and monuments and mouldering remains. It is fair to presume that neither party intended either to disturb the repose of the dead or do violence to the feelings of the living.”⁸

But while both the repose of the dead and the feelings of the living are thus respected and protected, circumstances will arise where such repose must of necessity be disturbed. Public improvements may demand the space occupied by a cemetery. The financial situation of the congregation which owns the property may become such that a voluntary or execution sale of it becomes unavoidable. The growth of a city may demand the removal of a cemetery as a sanitary necessity or as a commercial convenience. In such cases the repose of the dead is generally already disturbed. A cemetery situated among tall office buildings in the immediate proximity of crowded streets can hardly be considered as a fit resting-place for the dead. A removal of their remains in a proper way to a more suitable location, while in a sense it may violate their sepulchre, wound the feelings of their kindred and disturb the memorials erected by them,⁹ under the circumstances becomes entirely proper even as a matter of sentiment.

⁷ *In re Donn*, 14 N. Y. Supp. 189.

⁸ *Bean v. Lancaster First M. E. Church*, 3 Clark, (Pa.), 286.

⁹ *Beatty v. Kurtz*, 27 U. S. (2 Pet.) 566, 585.

"It is Gray and Goldsmith, and not Coke or Blackstone, who can best decide whether the calm repose of the rural cemetery, the solemn stillness of the country church-yard, be not preferable, in every element of proper value, to any 'easement' or place of deposit, however perpetual, amid the din, and dust, and turmoil of a crowded, trading city."¹⁰

But the removal of a cemetery under such circumstances is proper not only as a matter of sentiment, but also as a matter of law. Rights of burial under churches or in cemeteries are "so far public that private interests in them are subject to the control of the public authorities having charge of police regulations."¹¹ The right to bury, is therefore, purchased and held subject to the restriction that it must be so exercised as not to injure others. Though such injury may at the time be remote and inoffensive, the purchaser is bound to know that it may become otherwise. When this contingency happens the right of the legislature to take such action as is necessary for the comfort and preservation of the community cannot be questioned.¹² It has therefore been held that a city may under penalty forbid the further burial of dead bodies in such cemeteries,¹³ and may even order their removal though it has actually conveyed the property to the present holder under a covenant for quiet enjoyment.¹⁴

While thus the right and duty of a cemetery owner to vacate it in a proper case is perfectly plain, his right to determine who may be buried in it is equally clear. Without such right, church societies might find their cemeteries interminable sources of trouble. Not only might the peace of the society be disturbed by the burial of a person objectionable to its members, but the society itself might thereby actually be disrupted. To prevent such a result religious organizations may not only establish cemeteries exclusively denominational, but may also guard and protect them by such rules and regulations as make effective the objects and purposes of their organization.¹⁵ These rules and regulations will enter into and become a part of every contract for a lot in such cemetery unless the proof is clear and convincing that a contract of a different kind was properly made with the lot owner by a duly authorized agent of the organization.¹⁶

¹⁰ In the matter of Beekman Street, 4 Brad. Surr. (N. Y.) 503, 515.

¹¹ Sohler v. Trinity Church, 109 Mass. 1, 21.

¹² Kincaid's Appeal, 66 Pa. St. 411, 423.

¹³ City Council v. Baptist Church, 4 Strob. Law (S. C.) 306; Coates v. New York, 7 Cow. (N. Y.) 585.

¹⁴ Brick Presbyterian Church v. New York, 5 Cow. (N. Y.) 538.

¹⁵ People, ex rel. Coppers v. Trustees, 21 Hun (N. Y.) 184, 198.

¹⁶ Windt v. German Reformed Church, 4 Sandf. Ch. (N. Y.) 471, 474.

"When a party applies for a burial plot, at the office of a distinctly Roman Catholic cemetery, it is with the tacit understanding that he is either a Roman Catholic, and as such eligible to burial, or at least that he applies on behalf of those who are in communion with the church. The entire business is transacted on that basis."¹⁷ It follows that the mere payment of fees and charges confers the privilege of sepulchre only "in the mode used and permitted by the corporation."¹⁸ While, therefore, the trustees of a church society who hold a cemetery as a "free" burial ground cannot prevent the burial of a church member beside her husband where there is space left for that purpose,¹⁹ a person who has separated himself from the society,²⁰ or who according to its decision had ceased to be a member of it,²¹ is not entitled as a matter of right to be buried in such cemetery, though he had contributed to it while still a member. Nor may even a member of such organization bury his profligate son in such cemetery over the objection of the organization,²² nor be buried himself with ceremonies which are objectionable to it.²³

The nature of the title which the owner of a lot in a cemetery holds is a very peculiar one and is not very dissimilar to rights in pews.²⁴ "Every person purchasing either a pew in a church edifice, or a grave in a church-yard, appendant to a church, does so with the full knowledge and implied understanding that change of circumstances may, in time, require a change of location; and that the law * * * looking to such exigency, authorizes the corporation when it arrives * * * to sell the soil in absolute fee, discharged of all easements, and to make some other more appropriate investment or disposition of the proceeds."²⁵ While it may therefore be theoretically possible for a church corporation to give an absolute grant in fee of the small plots of ground sold as cemetery lots, and while courts, where expensive improvements had been erected over a particular lot, have held that a "base" fee in such lot had been vested in the holder either by the deed given to him²⁶ or through the vote of

¹⁷ *People, ex rel. Coppers v. Trustees*, 21 Hun. (N. Y.) 184, 194.

¹⁸ *Windt v. German Reformed Church*, 4 Sandf. Ch. (N. Y.) 471, 474.

¹⁹ *Antrim v. Malsbury*, 43 N. J. Eq. 288, 13 Atl. 180.

²⁰ *St. John's Church v. Hanns*, 31 Pa. St. 9.

²¹ *McGuire v. Trustees of St. Patrick's Cathedral*, 3 N. Y. Supp. 781, affirmed 54 Hun. 207, 7 N. Y. Supp. 345.

²² *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903.

²³ *People, ex rel. Coppers v. Trustees*, 21 Hun. (N. Y.) 184, 233, reversing 7 Abb. N. C. 121.

²⁴ *Sohier v. Trinity Church*, 109 Mass. 1, 21; *Price v. Methodist Church*, 4 Ohio 515.

²⁵ *Richards v. North West Protestant Dutch Church*, 32 Barb. (N. Y.) 42, 46, 20 How. Pr. 317, 322, 11 Abb. Pr. 30, 38.

²⁶ *Matter of Brick Presbyterian Church*, 3 Edw. Ch. (N. Y.) 155.

the territorial parish which was the owner at the time,²⁷ the universal holding is that the "certificate" or "receipt" which the purchaser of a lot receives, creates only a mere license,²⁸ or easement,²⁹ or usufructory right³⁰ or privilege of interment³¹ and entitles the holder of such privilege only to have the bodies interred in such ground "remain undisturbed so long as the cemetery shall continue to be used as such, and so long also, if its use continue, as such remains shall require for entire decomposition; and also the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture."³²

It will thus be seen that this privilege, or easement, or license, is neither unlimited on the part of the usufructory nor arbitrary on the part of the cemetery owners. While such owner may protect the approaches to his lot,³³ he can do so only for the purpose of protecting his right of sepulchre, since he has no other right to protect. "One who buys the privilege of burying his dead kinsmen or friends in a cemetery acquires no general right of property. He acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as is connected with the right of sepulture."³⁴ Nor may the cemetery owner decide to disinter the dead and devote the property to other uses without making due compensation.³⁵ If in the course of time it becomes necessary to vacate the ground as a burying ground he must give the lot owners due notice and the opportunity of removing the bodies and monuments to some other place of his own selection.³⁶ Whether the right of the usufructory is considered as a base fee or as an easement, he will be entitled as compensation only to an amount sufficient to cover the costs of removing the dead and re-interring them in a proper

²⁷ *Lakin v. Ames*, 64 Mass. (10 Cush.) 198.

²⁸ *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Partridge v. First Independent Church*, 39 Md. 631; *Rayner v. Nugent*, 60 Md. 515; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *McGuire v. Trustees of St. Patrick's Cathedral*, 3 N. Y. Supp. 781, affirmed 54 Hun. 207, 7 N. Y. Supp. 345; *Kincaid's Appeal*, 66 Pa. St. 411; *Craig v. First Presbyterian Church*, 88 Pa. St. 42, 32 Am. Rep. 417.

²⁹ *Richards v. North West Protestant Dutch Church*, 32 Barb. (N. Y.) 42, 20 How. Pr. 317, 11 Abb. Pr. 30.

³⁰ *Windt v. German Reformed Church*, 4 Sandf. Ch. (N. Y.) 471; *Price v. Methodist Church*, 4 Ohio 515; in the matter of *Beekman Street*, 4 Brad. Surr. (N. Y.) 503.

³¹ *Catholic Cathedral Church v. Manning*, 72 Md. 116, 19 Atl. 599.

³² *Windt v. German Reformed Church*, 4 Sandf. Ch. (N. Y.) 471, 474.

³³ *Burke v. Wall*, 29 La. Ann. 38, 29 Am. Rep. 316; *Lakin v. Ames*, 64 Mass. (10 Cush.) 198; *Matter of Brick Presbyterian Church*, 3 Edw. Ch. (N. Y.) 155.

³⁴ *Dwenger v. Geary*, 113 Ind. 106, 112, 14 N. E. 903.

³⁵ *Burke v. Wall*, 29 La. Ann. 38, 29 Am. Rep. 316.

³⁶ *Kincaid's Appeal*, 66 Pa. St. 411, 421; *Windt v. German Reformed Church*, 4 Sandf. Ch. (N. Y.) 471; *Richards v. North West Protestant Dutch Church*, 32 Barb. (N. Y.) 42; *Partridge v. First Independent Church*, 39 Md. 631.

place.³⁷ If he has erected a monument this will be regarded as personal property which he may remove, but for the cost of re-erecting which he will not be compensated.³⁸

To sum up: While the English common law protects only the monument erected over a grave, leaving the body itself to the care of the ecclesiastical courts, the American law, being unembarrassed by an ecclesiastical legal system, will effectually prevent the desecration of both. This protection, however, will not be extended so far as to come in conflict with the vital interests of the living. A cemetery will therefore have to yield to the police power and the power of eminent domain. Even commercial considerations may form a proper reason for its removal. Where such removal takes place, the lot-owner must be compensated by providing him a new proper place of burial and by paying the costs of properly removing the remains to the same. While the cemetery is permitted to remain, its owners may by rules and regulations limit the license to bury to such as have died as members in good standing of some particular church, and such licensees in turn may protect their rights by preventing the proper access to their lots from being cut off.

CARL ZOLLMANN.

Chicago, Illinois.

³⁷ In the Matter of Beekman Street, 4 Bradf. Surr. (N. Y.) 503.

³⁸ Partridge v. First Independent Church, 39 Md. 631.